IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 16, 2006

MELVIN J. REED v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2003-B-798 Steve Dozier, Judge

No. M2005-02011-CCA-R3-PC - Filed July 21, 2006

The Petitioner, Melvin J. Reed, appeals the Davidson County Criminal Court's summary dismissal of his petition for post conviction relief. The trial court determined that the petition was filed outside the statute of limitations. After a review of the record, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Melvin J. Reed, Pro Se.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Amy Eisenbeck, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Factual Background

On April 21, 2003, the Petitioner was indicted for possession with the intent to sell or deliver twenty-six grams or more of a substance containing cocaine, a Class B felony. See Tenn. Code Ann. § 39-17-417. On September 17, 2003, the Petitioner pled guilty as charged. The facts, as stipulated at the guilty plea hearing, established that:

> [O]n May twenty-fourth of last year, the Defendant was stopped on a traffic stop by a Metro Police Officer.
>
> In plain view from the passenger side of the vehicle, the Metro Officer was able to see digital scales located under the seat.

> The officer approached the driver's side and immediately noted the odor of marijuana exuding from the vehicle. The officers conducted a probable-cause search of the vehicle.
>
> Next to the electronic scales, the officers found a bag that contained twenty-seven-point-seven grams of a white-powder substance, which later lab-tested positive to be cocaine.
>
> The officers advised the Defendant of his [r]ights. He did state that he was just trying to make a living.

A sentencing hearing was held on October 30, 2003. The trial court imposed a Range I sentence of ten years to be served in the Department of Correction and to be served consecutively to a sentence for which he was on probation at the time of the present offense. The Petitioner did not file a direct appeal.

On August 9, 2004, the Petitioner filed his first petition for post-conviction relief. In an amended petition filed after the appointment of counsel, the Petitioner alleged that his trial counsel was ineffective, his plea was not knowing and voluntary, and his sentence was imposed in violation of his right to a jury trial as set forth in Blakely v. Washington, 542 U.S. 296 (2004).

An evidentiary hearing was held on December 9, 2004. At the hearing, the Petitioner testified, among other things, that when he entered his guilty plea, it was his understanding that he was being sentenced to eight years. Trial Counsel testified that he informed the Petitioner of his sentence range, eight to ten years, and that the trial court would make the final determination as to the length of the sentence. The plea petition, signed by the Petitioner, indicated a sentence range of eight to thirty years. The post-conviction court reviewed the transcript of the guilty plea hearing. The transcript of the guilty plea hearing clearly reflects that the plea agreement was for an eight year sentence, with the trial court to determine the manner of service. At the beginning of the sentencing hearing, both the court and the prosecuting assistant district attorney general noted an agreed eight-year sentence with only the manner of service to be determined by the court. At the conclusion of the sentencing hearing, it appears that the trial court mistakenly announced and entered the ten year sentence rather than the eight year sentence. No one at the sentencing hearing called the discrepancy to the trial court's attention. The trial court ordered a sentence of ten years.

At the conclusion of the hearing on the first post-conviction petition, the following colloquy took place:

> [POST-CONVICTION COUNSEL]: . . . But I believe a little firmer, Judge, is the argument that [the Petitioner] was very much confused about the length of his sentence when he was standing here doing his plea.

THE COURT: So he would withdraw his petition for post conviction relief if an eight year sentence were imposed?

[POST-CONVICTION COUNSEL]: I believe [the Petitioner] would agree to that, Judge. Is that true?

[THE PETITIONER]: I want to set aside my guilty plea.

THE COURT: Apparently, he's still wanting to set aside his guilty plea.

[POST-CONVICTION COUNSEL]: [The Petitioner] would withdraw his plea if it's modified down to eight.

THE COURT: An eight year sentence to serve consecutive to his other sentence?

[POST-CONVICTION COUNSEL]: Yes, Judge.

THE COURT: Is that accurate . . . ?

THE PETITIONER: Right.

THE COURT: All right. Does the State care to be heard on that issue?

[THE STATE]: No, Your Honor.

THE COURT: All right. Then based on [the Petitioner's] statement here about his petition and what he is at this time seeking, the Court, I think, based on reading the transcript - - I don't fault [Trial Counsel] in any way. I fault myself and/or [the assistant district attorney general], but I do think the fair thing to do is amend the sentence to an eight year sentence. I still do not think he is an appropriate candidate for probation, whatever the sentence would be. And based on [the Petitioner's] statement here today, will show the post-conviction petition stricken and an amended judgment will be entered to reflect an eight year sentence consecutive to the sentences or sentence he's previously serving. All right.

The court minutes of that same day recite that the petition for post-conviction relief was stricken. Also that same day, an amended judgment reflecting an eight-year sentence was entered.

On August 5, 2005, the Petitioner filed the present petition for post-conviction relief, alleging that: (1) the officers lacked probable cause to stop his vehicle; (2) prosecutorial misconduct, (3) ineffective assistance of counsel, and (4) his plea was obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969), and State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). By order dated August

12, 2005, the post-conviction court summarily dismissed the petition for post-conviction relief, finding that it was barred by the one-year statute of limitations. It is from the order of the trial court dismissing the second petition for post-conviction relief that the Petitioner appeals.

ANALYSIS

The Petitioner's statute of limitations argument is two-fold. First, he contends that he had one year from December 9, 2004, the date of entry of the amended judgment, to file the petition. Second, he argues that did not make a voluntary and intelligent decision to withdraw his original petition, presumably implicating due process concerns.

Tennessee Code Annotated section 40-30-102(a) provides that a claim for post-conviction relief must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred." Tenn. Code Ann. § 40-30-102(a). The statute contains a specific anti-tolling provision, which states:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise.

Id.

Initially, we conclude that the amended judgment was entered to correct a clerical mistake or an error arising from oversight pursuant to Tennessee Rule of Criminal Procedure 36. This Court has held that "correction of a judgment pursuant to Rule 36 does not extend the statutory period for filing a petition for post-conviction relief." Alan Hall v. State, No. E2000-01522-CCA-R3-PC, 2001 WL 543426, at *1 (Tenn. Crim. App., Knoxville, May 23, 2001) (quotation omitted).[1]

Moreover, Tennessee Code Annotated section 40-30-109(c) specifically provides that the voluntary withdrawal of a petition does not toll the one-year statute of limitations. Tenn. Code Ann. § 40-30-109(c) ("The petitioner may withdraw a petition at any time prior to the hearing without prejudice to any rights to refile, but the withdrawn petition shall not toll the statute of limitations set forth in 40-30-102.").

[1]The Petitioner contends that this line of case law is not applicable because his amended sentence resulted from a petition for post-conviction, not Rule 36 of the Tennessee Rules of Criminal Procedure. However, the petition was withdrawn, and the trial court's authority to correct the final judgment was pursuant to Rule 36. See Tenn. Crim. P. 36.

In this case, withdrawal of the petition occurred after the one-year statute of limitations had already run. Thus, his August 5, 2005 petition was barred by the statute of limitations.

In his brief, the Petitioner claims that he did not voluntarily withdraw his original petition for post-conviction relief. Specifically, he states:

> The lower court is in error as to whether the previous petition was voluntarily withdrawn. It is clear from the hearing that the [Petitioner] wanted his conviction set aside. However, the appointed counsel confused the [Petitioner] and made the determination for the [Petitioner]. [The Petitioner] was asked by the court of his wishes and the [Petitioner] stated to the court the desire to have his conviction set aside.

The post-conviction court found that "[o]n December 9, 2004, at the post-conviction hearing, the [P]etitioner agreed, as reflected upon the record, to strike his petition with the agreement that his sentence of ten (10) years at thirty percent (30%) be reduced to eight (8) years at thirty percent (30%)." Furthermore, it is well-settled in Tennessee that there is no constitutional or statutory right to the effective assistance of counsel in a post-conviction proceeding, see House v. State, 911 S.W.2d 705, 712 (Tenn. 1995), and the Petitioner does not claim any mental disability that rendered him unable either to manage his personal affairs or to understand his legal rights and liabilities during the relevant period. See State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001). Accordingly, we conclude that the Petitioner does not assert any grounds to support a tolling of the statute of limitations on due process grounds. See State v. Larry C. Strong, No. M2004-02253-CCA-R3-PC, 2005 WL 1353320, at *2 (Tenn. Crim. App., Nashville, June 8, 2005).

Finally, we note that the Petitioner has failed to assert any of the statutory grounds for tolling the statute. He cites no new constitutional rule, refers to no new scientific evidence, and makes no claim that an earlier conviction has been overturned. See Tenn. Code Ann. § 40-30-102(b).

CONCLUSION

The Petitioner's post-conviction petition is barred by the statute of limitations. The judgment of the Davidson County Criminal Court summarily dismissing the petition is affirmed.

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DAVID H. WELLES, JUDGE